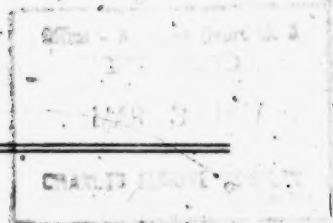


FILE COPY



**IN THE
SUPREME COURT OF THE UNITED STATES**

~
October Term, 1946

~
No. 583

~
**PHILIP B. FLEMING, Temporary Controls
Administrator, Petitioner**

v.

**MOHAWK WRECKING and LUMBER COMPANY,
a Partnership, and Harry Smith**

~
**On Motion of Respondent to Vacate Order of This
Court Permitting Substitution of Temporary
Controls Administrator for Price Ad-
ministrator as Petitioner**

~
**BRIEF FOR RESPONDENT IN SUPPORT OF
MOTION TO VACATE**

~
BROWN, FENLON & BABCOCK,
*Attorneys for Respondent
and Moving Party.*

By: John W. Babcock.

DAVID A. GOLDMAN,
*Of Counsel,
On the Brief.*

INDEX

	Page
Previous Action Desired Vacated	1
Questions Presented	2
Statutes Involved	2
Court Rule Involved	2
Statement	3
Specification of Errors	4
Summary of Argument	4
Argument	5
Conclusion	30

Citations

Constitutional Provisions:

Article 2, Section 2, Clause 2	9
Article 2, Section 2, Clause 3	10

Executive Orders:

No. 9250 (50 U.S.C.A. War App. Sec. 901, Page 314)	6
No. 9638 (50 U.S.C.A. War App. Sec. 601, Page 71, P.P.)	6
No. 9801 (C.C.H. War Law Ser., Sec. 41, 999.13)	21, 28
No. 9809 (11 F.R. 14281)	5, 18, 25
Proclamation 2714 (12 F. R. No. 1, page 11)	18
Statement of the President accompanying Decontrol (C.C.H., War Law Ser., Sec. 41,371)	28

Statutes:

Emergency Price Control Act, 1942 (50 U.S.C.A. War App., Sec. 901)	6, 7, 8, 13, 19
First War Powers Act, 1941 (50 U.S.C.A. War App., Sec. 601)	6, 11, 13
Office of War Mobilization & Reconver- sion (50 U.S.C.A. War App., Sec. 1651)	6
Price Control Extension Act, 1946 (50 U.S.C.A. War App., 901(a) P.P.)	22

Statutes: (Continued)

Survivals of Actions, Suits or Proceedings (28 U.S.C.A., Sec. 780)	24, 28
Second War Powers Act, 1942 (50 U.S.C.A. War App., Sec. 631)	5, 18
Stabilization Act of 1942 (50 U.S.C.A. War App., Sec. 961)	5, 21

Cases:

Cudahy Packing Co. v. Holland, 315 U.S. 377	8
In Re Duncan's Estate, 199 A. 208	26
In re Opinion of Justices, 190 Mass. 616, 78 N.E. 311	10
McBride v. Osborn, 59 Ariz. 321, 127 Pac. (2d) 134	11
Pinkus & Segal v. Porter, 155 F. (2d) 90	8
Porter v. Gantner & Mattern Co., 156 F. (2d) 886	8
Porter v. Mohawk Wrecking & Lumber Co., 156 F. (2d) 891	8
Porter v. Murray, 156 F. (2d) 781	8
Porter v. Ryan (15 U.S. Law Week, page 2390)	20
Raley v. Porter, 156 F. (2d) 561	8
U. S. ex rel. Bernardin v. Butterworth, 169 U.S. 600	27

General Authorities:

Black's Law Dictionary, 3rd Ed.	26, 28
Cong. Record (Vol. 87, No. 225, Page 10119)	15
Funk & Wagnells New Standard Dictionary	26
Supplementary Order No. 198, O.P.A. (Vol. 11, Fed. Reg. No. 222, Page 13464)	18, 27
Webster's New International Dictionary (2d Ed.)	15

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1946

No. 583

**PHILIP B. FLEMING, Temporary Controls
Administrator, Petitioner**

v.

**MOHAWK WRECKING and LUMBER COMPANY,
a Partnership, and Harry Smith**

**On Motion of Respondent to Vacate Order of This
Court Permitting Substitution of Temporary
Controls Administrator for Price Ad-
ministrator as Petitioner**

**BRIEF FOR RESPONDENT IN SUPPORT OF
MOTION TO VACATE**

PREVIOUS ACTIONS DESIRED VACATED

On December 16, 1946, the court entered an Order granting a Motion of the Acting Solicitor General of the United States reading as follows:

"The Solicitor General suggests to the court the resignation of The Honorable Paul A. Porter, as Administrator, Office of Price Administration, effective December 12, 1946, and moves that his successor, Philip B. Fleming, Temporary Controls Administrator, who assumed office December 12, 1946, be substituted as Petitioner in the above case."

QUESTIONS PRESENTED

1. Is Philip B. Fleming, Temporary Controls Administrator, the legal successor in authority, powers, functions and office to Paul A. Porter, Price Administrator, Office of Price Administration?
2. On December 12, 1946, was the President of the United States vested with authority and power to consolidate the Office of Price Administrator with any other office or offices and confer upon the Head of the Office of Temporary Controls all of the functions and powers of the Price Administrator with full power and authority to continue and maintain civil proceedings in the courts previously instituted by the Price Administrator?
3. Within and upon the Motion of the Acting Solicitor General, was there a showing of substantial need for continuing and maintaining this action in the name of the Temporary Controls Administrator?

STATUTE AND COURT RULE INVOLVED

STATUTE: Act of February 13, 1925, Section 11, (Title 28, U.S.C.A., Section 780).

COURT RULE: Rule 19, Rules of the Supreme Court, Section 4.

STATEMENT

Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit was granted in the matter upon the application of Paul A. Porter, Price Administrator, Office of Price Administration. While this matter was pending, and on December 12, 1946, Paul A. Porter, by resignation, ceased to hold the office of Administrator, Office of Price Administration, and no other person or official has since been appointed to that office. On December 13, 1946, the Acting Solicitor General of the United States filed the following Motion in this court, to-wit:

"The Solicitor General suggests to the court the resignation of the Honorable Paul A. Porter as Administrator, Office of Price Administration, effective December 12, 1946, and moves that his successor, Philip B. Fleming, Temporary Controls Administrator, who assumed office December 12, 1946, be substituted as Petitioner in the above case."

For reasons unexplainable, respondent did not receive notice of or information about this Motion to substitute, until three days after the Motion, by Order of Court, was granted on December 16, 1946. Respondent promptly filed and noticed a Motion to Vacate said Order of December 16, 1946, and on January 6, 1947, this court ordered:

"Further consideration of the motion to vacate the order of December 16 substituting Fleming for Porter is postponed to the hearing of the case on the merits."

SPECIFICATIONS OF ERRORS

This court erred in granting the Motion for substitution, and substitution of Philip B. Fleming cannot and should not be permitted.

SUMMARY OF ARGUMENT

A. The President of the United States cannot by Executive Order transfer to an officer established by him through Executive Order the functions of an Officer established by Congress and whose appointment must have Congressional confirmation.

B. Philip B. Fleming as Administrator of the Office of Temporary Controls is not the "successor in office" of Paul A. Porter, Administrator of the Office of Price Administration.

C. There is no substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved.

ARGUMENT

A. The President of the United States cannot by Executive Order transfer to an officer established by him through Executive Order the functions of an officer established by Congress and whose appointment must have congressional confirmation.

1. Sources of Authority of Executive Order 9809.

On December 12, 1946, the President, acting "by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941, Title III of the Second War Powers Act, 1942, section 201 (b) of the Emergency Price Control Act of 1942, as amended, and section 2 of the Stabilization Act of 1942, and as President of the United States" promulgated Executive Order 9809 "for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government." The Executive Order seeks to consolidate into one agency in the Office for Emergency Management in the Executive Office of the President, to be known as the "Office of Temporary Controls" the following: Office of War Mobilization and Reconversion, Office of Price Administration, Office of Economic Stabilization, and the Civilian Production Administration.

The two offices first named were created by Congressional enactment and provided for the administra-

tion of such offices through "Administrators" who were to be "appointed by the President, by and with the advice and consent of the Senate." (Emergency Price Control Act 1942, U.S.C.A., Title 50, War Appendix, Section 921); (Office of War Mobilization and Reconversion, U.S.C.A., Title 50, War Appendix, Section 1651). The two offices last named were created by Executive Orders of the President, under authority claimed vested in the President by the Constitution and Statutes including Title I of the First War Powers Act 1941, and as President of the United States (Executive Order 9638, U.S.C.A., Title 50, War Appendix, Section 601, page 71, Pocket Part; Executive Order 9250, U.S.C.A., Title 50, War Appendix, Section 901, page 314).

Section 201 of the Emergency Price Control Act, 1942, conferred upon the Administrator who "shall be appointed by the President, by and with the advice and consent of the Senate" vast powers to accomplish the avowed purposes of the Act, which were:

(Section 901, Page 313; U.S.C.A. Title 50, War Appendix):

"* * * To stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance annuities, and pensions, from undue impairment of their standard of living; to prevent hard-

ships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in price; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3 (section 903 of this Appendix); and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes." * * *

The Congress in subsequently enacting provisions and granting authority to the Office of Price Administration and the Price Administrator to be so appointed, placed great reliance upon the "judgment of the Price Administrator", who, in accordance with the provisions of Section 201 of Title II of the Act was to be an individual appointed by the President, but only by and with the advice and consent of one of the legislative arms of the Congress. Thus Section 2(a) of the Emergency Price Control Act (U.S.C.A., Title 50, Appendix, Section 902(a)) declares:

*"Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act * * *, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act"* (Italics supplied).

The power to make application to an appropriate court is given to the Administrator for an order to enjoin such acts, "whenever in the judgment of the

Administrator any person has engaged or is about to engage in any acts or practices which constitute or, will constitute a violation of any provision of Section 4 of this Act" * * *, and the power to institute treble damage suits under certain conditions is also conferred upon the Administrator. (See Sections 205 (a) and 205 (e), Emergency Price Control Act, U.S.C.A., War Appendix, Section 925 (a) and 925 (e)). These are non-delegable powers calling for personal judgment of a particular individual (See *Porter v. Mohawk Wrecking and Lumber Company*, 156 F. (2d) 891; Certiorari granted Nov. 12, 1946; *Cudahy Packing Company v. Holland*, 315 U. S. 357.

Even if power to delegate authority to initiate civil litigation be in the Price Administrator such power is vested in that one official and not in another even though that other be the President of the United States. The cases of *Pinkus and Segal v. Porter*, 155 F. (2d) 90; *Raley v. Porter*, 156 F. (2d) 561; *Porter v. Gantner & Maitern Co.*, 156 F. (2d) 886; *Porter v. Murray*, 156 F. (2d) 781 differ in their conclusions from that of the *Mohawk Wrecking case*, supra, in holding that the subpoena power conferred by the Congress upon the Price Administrator is delegable. But it is emphasized that such power, if it be held properly delegable by the United States Supreme Court, has been conferred upon the Price Administrator and no other Government official.

Having declared that the broad powers and authority conferred upon the Administrator were to be exercised only by an individual appointed by the President "by and with the advice and consent of the Senate", it would appear that only clear and unequi-

vocal language contained in the Constitution or Statutes relied upon by the President, could legally uphold the attempted consolidation in the Office for Emergency Management by Executive Order of the functions of the Office of Price Administration, among other offices created by Congress, to be administered in such manner as the Head thereof may deem desirable, who by appointment of the President only is sought to be invested with the power to perform the functions of the Price Administrator including "the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the Price Administrator (including any such proceedings now pending)."

An analysis of the authorities cited for the action taken reveals an absence of legal foundation to support the President's action:

(a) *THE CONSTITUTION:*

The general reference to authority vested in the President by the Constitution leaves open to question the specific authority relied upon. There appears to be only two sections of the Constitution touching upon the matter under consideration: Article 2, Section 2, Clause 2, provides:

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court; and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which

shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Article 2, Section 2, Clause 3, provides:

"The President shall have Power to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

As to the first Clause above quoted, a fair reading of the language would clearly lead to the conclusion that the Congress, having specifically provided the method for the appointment of the Administrator of the Office of Price Administration has made its wishes mandatory upon the President and the Chief Executive Officer is now precluded from following any other manner of appointment.

Hence, where the Constitution of a State declares that a power to act is in the Governor, "by and with the advice of council" or "by and with the advice and consent of the council"; the responsibility rests primarily on the Governor to determine as the Supreme Executive Magistrate whether any action is called for, and what action, if any, is desirable; and the provision for advice of the council is a requirement that their approval and consent shall accompany the affirmative act and enter into it before it becomes complete and effective. In re Opinion of Justices, 190 Mass. 616, 78 N.E. 311, 312.

And where the Governor has authority to appoint members of an Industrial Commission "by and with

the authority" of the Senate, the approval of the senate is just as necessary as the action of the Governor to complete the appointment and give the appointee any right to take over the office and discharge its duties. *McBride v. Osborn*, 59 Ariz. 321, 127 Pac. (2) 134, 136.

Furthermore, the Administrator of the Office of Temporary Controls is not filling a vacancy that happened during the recess of the Senate, but rather has been appointed as the Head of a new office, hence, no reliance can be placed upon Clause 3 of the Constitution quoted above.

(b) *TITLE I—FIRST WAR POWERS ACT, 1941.*

Sections 1 and 2 of Title I of the First War Powers Act, 1941, read as follows:

"§601. COORDINATION OF EXECUTIVE BUREAUS, OFFICES, ETC. BY PRESIDENT FOR NATIONAL DEFENSE AND TO PROSECUTE THE WAR; ISSUANCE OF REGULATIONS.

For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander-in-Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the pur-

poses of this title [sections 601-605 of this Appendix], and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935 [sections 301-310, 311-314 of Title 44]: Provided, That the termination of this title [sections 601-605 of this Appendix], shall not affect any act done or any right or obligation accruing or accrued pursuant to this title [sections 601-605 of this Appendix] and during the time that this title [sections 601-605 of this Appendix], is in force; *Provided further, That the authority by this title [sections 601-605 of this Appendix], granted shall be exercised only in matters relating to the conduct of the present war:* Provided further, That no redistribution of functions shall provide for the transfer, consolidation, or abolition of the whole or any part of the General Accounting Office or of all or any part of its functions. Dec. 18, 1941, c. 593, Title I, §, 55 Stat. 838.

“§602. SAME. CONSOLIDATION OF OFFICES; TRANSFER OF DUTIES, PERSONNEL, AND RECORDS.

In carrying out the purposes of this title, [sections 601-605, of this Appendix] the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers *now existing by law*, to transfer any duties or powers from *one existing department, commission, bureau, agency, governmental corporation, office, or officer to another*, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto. Dec. 18, 1941, c. 593, Title I, § 2, 55 Stat. 838” (Italics supplied).

The First War Powers Act was passed December 18, 1941. The language italicized clearly limits the redistribution of functions among executive agencies to those *hitherto by law conferred* upon any executive department, commission, bureau, agency, governmental corporation, office or officer. It is an authorization applicable to "executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers *now existing by law.*" The Congress was thus addressing itself to the condition as it existed at the time of the passage of the Act. The Emergency Price Control Act, 1942, was passed on January 30, 1942. Hence, the functions, powers and authority conferred upon the Price Administrator or the Office of Price Administration are not subject to utilization, coordination or consolidation by the President. The authority of the President to redistribute functions is not unlimited. It was an authority limited to existing departments, commissions, bureaus, agencies, governmental corporations, offices and officers. It was an authority subject to the subsequent enactments of Congress—including the Emergency Price Control Act, 1942—conferring upon an office and an officer, who could be appointed by the President but who could not assume his duties or exercise the prerogatives of the office until his appointment had been considered by and consented to by the Senate of the United States, functions which were not subject to transfer into an office created by Executive Order.

That such was the intent of Congress is seen by reference to Section 4 of Title I of the First War Powers Act (Title 50 War App. Sec. 604) where it is provided that "should the President, in redistributing

the functions among the executive agencies as provided in this Title . . . , conclude that any bureau should be abolished and its or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper." Thus the Congress specifically precluded the President from the action which he has sought to take by means of an Executive Order. The Congress had retained the power unto itself to abolish bureaus and had retained unto itself the power to confer such functions theretofore exercised by the bureau abolished to some other department or bureau.

Moreover, the authority conferred upon the President "to make such redistribution of function among executive agencies as he may deem necessary" is restricted by the later proviso of the act that "the authority by this title granted shall be exercised only in matters relating to the conduct of the present war."¹

¹ This language is taken from the Overman Act which Congress passed at the time of the First World War. As a matter of fact, the First War Powers Act, 1941, is patterned closely after the Overman Act. Title I above referred to finds its counterpart in a similar Title of the Overman Act which reads as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any function, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall deem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he

It is submitted that regardless of any position that a state of war continue to exist until formal action is taken declaring it an end, when this legislation speaks of "the conduct of the present war", it means, and it was the intention of Congress, that this authority was given only for that period during which actual hostilities were in progress. "To conduct" a war constitutes an affirmative status of hostilities as distinguished from "living" or "existing" during a "state of war" which awaits only a stroke of the pen to formally come to an end.

"Conduct stresses the idea of immediate supervision or personal leadership; as, to *conduct* negotiations, an investigation, a campaign, a prayer meeting."—Webster's New International Dictionary, 2d ed., page 557,

That the Congress was acutely aware of the limiting character of the proviso above referred to is shown by reference to the Congressional Record for December 16, 1941 (Volume 87, No. 225, page 10119) where the following discussion is set forth:

"MR. CASE of South Dakota. I hope that the gentleman in his remarks will explain the last proviso in section 1 of the bill. My reason for making the request is that section 1 of title I,

may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record: Provided, That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace, or at such earlier time as the President may designate: Provided further, That the termination of this Act shall not affect any act done or any right or obligation accruing or accrued pursuant to this Act and during the time that this Act is in force: Provided further, That the authority by this Act granted shall be exercised only in matters relating to the conduct of the present war." (40 Stat. Ch. 78, page 556). See also: Cong. Record, Dec. 16, 1941, page 9860.

as I understand it, is practically a reorganization bill in itself, and even gives more powers for the reorganization of Government agencies than was proposed in the so-called Reorganization Act. At that time we had some exceptions in the case of certain specific agencies. This proviso, I believe, takes care of that situation.

"MR. HANCOCK. Mr. Chairman, there are several safeguards on the powers granted by the first title which I shall try to point out as I go along.

"This bill was introduced at the request of the executive department. They feel very strongly that this bill is urgently and promptly needed for the successful prosecution of the war and for the support and maintenance of the Army and Navy. They are asking for the same powers that President Wilson had and used extensively in the last World War. I may point out that those powers were returned to the Congress and to the people when the war was over. It is true it took a change of administration to do it, but history may repeat itself when this crisis is passed.

"As has been pointed out to you, this title is practically reenactment of a bill passed by the Congress and approved by the President on May 20, 1918. It was a war bill, known as the Overman Act. The first title to the present bill is identical with that act except it omits section 3 of the original act which is no longer necessary or desirable. That section set up a special agency to regulate and control the production of aircraft. The provision has been dropped from the present bill.

"There is one other change. Under the original act the rules and regulations of the President for redistributing functions among the executive agencies before becoming effective were obliged to be filed in the offices of the chiefs of the agencies or bureaus affected. Now those orders and

regulations to be effective under the Federal Register Act of 1935 must be deposited with the Archivist before they have the effect of law. The bill is changed accordingly. The gentleman from South Dakota pointed out that at the end of section 1, title I, this language occurs:

'Provided further, That the authority by this title granted shall be exercised only in matters relating to the conduct of the present war.'

"There is a further safeguard to the same effect in the opening line of the first section, which reads that this bill is for the purpose of—

national security and defense, the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy.

"It is provided in section 5 that upon termination of this title all executive or administrative agencies, governmental corporations, departments, and so forth, shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided. In other words, when the war and the emergency passes, the various bureaus and agencies of the Government will return to their normal functions. They will be placed in status quo except as changed hereafter by act of Congress. Further, the very last paragraph of the last title provides that titles I and II of this bill shall remain in force during the continuation of the present war and for 6 months after the termination of the war, or until such earlier date—we were rather careful to insert this safeguard—as Congress by a concurrent resolution or the President may designate.

"So there are four distinct limits on the danger of these vast powers becoming permanent law."

Furthermore, eighteen (18) days after the issuance of Executive Order 9809 creating the Office of Temporary Controls, the President by Proclamation 2714 of January 1, 1947 proclaimed "the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946. Accordingly, there is no reason for seeking to exercise powers under a statute expressly intended to be "for the conduct of the present war."

Indeed, when it is considered that on November 12, 1946 the Office of Price Administration issued Supplementary Order #193 exempting all commodities (including services) from price control, except sugar, molasses, syrups and rice, [see Supplementary Order 193, Fed. Reg. November 14, 1946, page 13464, Vol. 11—No. 222] to attempt to justify the action taken in seeking to redistribute functions to a new Office of Temporary Controls as a matter "relating to the conduct of the present war" appears to be stretching language beyond the breaking point, especially since Executive Order 9809 states "that it is for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government." * * *

(c) *TITLE III—SECOND WAR POWERS ACT.*

Title III of the Second War Powers Act, 1942 is entitled "Priorities Powers" and establishes a system for priority and rationing of material which gives precedence to war contracts. Section 8 of such title declares:

"The President may exercise any power, authority or discretion conferred on him by this sub-

section (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

Since the violation alleged is not that pertaining to a subject covered by the prohibitions of the Second War Powers Act no reliance can be placed upon such Act to support the action sought to be taken by the Hon. Philip W. Fleming in continuing this action.

(d) **SECTION 201 (b)—EMERGENCY PRICE CONTROL ACT 1942.**

Section, 201(b) of the Emergency Price Control Act of 1942, as amended (Section 921, U.S.C.A. Title 50, War Appendix), reads in part as follows:

"The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred."

Section 302(c) of the Emergency Price Control Act of 1942 (Section 942, U.S.C.A. Title 50, War Appendix) defines "commodity" and nowhere in that definition can we find language that will support a theory by which the President might transfer generally the powers and functions granted and conferred upon the administrator by the Emergency Price Control Act of 1942, as amended. On the contrary, the authorization granted to the President to transfer any of the powers and functions conferred by the Act pertains to a particular commodity and was never intended to pertain to the "functions" of the Price Administrator in the sense indicated in Executive Order 9809.

The United States Law Week dated January 14, 1947, 15 L.W. page 2390, reports the case of *Porter v. Ryan*, U.S.D.C., Ore., January 8, 1947, as follows:

"Temporary Controls Administrator may not be substituted for Price Administrator as party-plaintiff in rent control suit in absence of Senate confirmation of his appointment as successor to functions of Office of Price Administration.

"(Text) 'This is a rent case and I am unable to understand how the President can by-pass the Senate under a clause of the Price Control Act which reads: " * * * The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities * * * Sec. 201(b).'"

(e) **SECTION 2—STABILIZATION ACT OF 1942.**

Section 2 of the Stabilization Act of 1942 declares:

"The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 [sections 903 (a), 903 (c), and 942 (c) (1) of this Appendix] to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof. Oct. 2, 1942, c. 578, § 2, 56 Stat. 765." (Title 50, War Appendix, U.S.C.A. Sec. 962).

It is apparent that this section authorizes the President to exercise any power or authority conferred upon him by the Act through such department, agency or officer as he shall direct. Obviously the section does not authorize the President to transfer the powers and functions of the Price Administrator to the new office of Temporary Controls established by Executive Order 9809.

Moreover, the President had already, by Executive Order 9801 of November 9, 1946 (Fed. Reg. November 12, 1946; CCH, War Law Service, Sec. 41, 999.13) terminated all controls theretofore in effect, stabilizing wages and salaries pursuant to the provisions of the Stabilization Act of 1942, as amended, including any Executive Order or regulation issued thereunder "except that as to offenses committed, or rights or liabilities incurred prior to the date hereof, the provi-

sions of such Executive orders and regulations shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense."

"The exception above quoted quite clearly gives no authority to the President to transfer the powers and functions of the Price Administrator to a new agency.

(f) *AS PRESIDENT OF THE UNITED STATES.*

This general language seems to fall under the category of "*descriptio personae*" and simply identifies the individual seeking to consolidate and transfer the functions mentioned. In view of the specific language of the Emergency Price Control Act of 1942 indicating the method and manner of appointment of the individual who was to be intrusted with the vast powers granted by the Congress, it would seem that no authority from this general phrase constituting the legal basis for the transfer of the Price Administrator's functions can be derived.

Furthermore, though we reserve the right, at the proper time, to raise the question of the legality of enactment of the so-called Price Control Extension Act of 1946, we desire to call the courts attention to Section 1A of that purported legislation. Subparagraph (c) (2) of Section 1A provides:

"On or before April 1, 1947, the President shall report to the Congress what, if any, commodities or classes of commodities, including housing accommodations, are in such critically short supply as to necessitate, in his judgment, the continuance of the powers granted by this Act as to them after June 30, 1947, together with his recom-

mendations as to established departments or agencies of the Government (other than the Office of Price Administration) which should be charged with the administration of such powers."

In the light of this language it would appear that Congress had reserved to itself the power to determine whether the powers and functions of the Office of Price Administration should be transferred to other agencies and if so, to what agencies and under what conditions. Congress, it appears, intended that the President report to Congress and that it, the Congress, would then decide whether to adopt the President's recommendation or would determine what established departments or agencies of the Government, if any, should be charged with the future administration of the powers and functions conferred upon the Office of Price Administration by the Emergency Price Control Act of 1942, as amended.

If Congress had intended to authorize the President to transfer the functions of the Price Administrator and the administration of the Office of Price Administration to an entirely new and distinct agency not created by Congress, it is not too much to say that the Price Control Extension Act of 1946, enacted as recent as July 25, 1946 would have contained clear and unequivocal language granting such authority. Not only is the authority not granted but on the contrary Congress specifically required the President to report to the Congress his recommendations as to such transfer so that the Congress could determine what transfers of powers, if any, would be made and to what agency, bureau or department.

B. Philip B. Fleming, as Administrator of the Office of Temporary Controls, is not "the successor in office" of Paul A. Porter, Administrator of the Office of Price Administration.

The petition of Philip B. Fleming praying that he, as Administrator, Office of Temporary Controls, be substituted as plaintiff in the cause in the place and stead of Paul A. Porter Administrator, Office of Price Administration, is predicated upon the provisions of 28 U.S.C.A., Section 780, which reads as follows:

"(a) By or against officer of United States, District of Columbia, Canal Zone, or territory or insular possession of United States; or of county, and so forth of such territory or insular possession: Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharges of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

"(b) By or against officer of State, county, city, and so forth. Similar proceedings may be

had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the Officer's death or separation from the office.

"(c) *Notice of application for substitution of parties.* Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and *accorded an opportunity to present any objection which he may have.* (Feb. 8, 1899, c. 121, 30 Stat. 822; Feb. 13, 1925, c. 229, § 11, 43 Stat. 941.)"

By reference to subsection (a) above quoted it is seen that this cause can only be continued and maintained by or against the "successor in office of such officer", but only when it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause. It appears to be clear that Philip B. Fleming is not the "successor in office" of Paul A. Porter. (See Rule 19, Rules of the Supreme Court, Section 4.) Philip B. Fleming has not been appointed by the President "with the advice and consent of the Senate." Executive Order 9809, by its very terms, creates a new office, Office of Temporary Controls in which the Office of Price Administration, the Office of War Mobilization and Reconversion, the Office of Economic Stabilization and the Civilian Production Administration are consolidated and the functions vested in the Administrator of the Office of Price Administration are sought to be transferred and given to the Administrator, Office of Temporary Controls. A successor is "one who or that which succeeded or takes the place of a predecessor or preceding thing; especially, one who succeeded

to another's rank or property." Funk and Wagnells New Standard Dictionary of the English Language.

"*Successor.* One who succeeds to the rights or place of another; particularly the person or persons who constitute a corporation after the death or removal of those who precede them as corporators."

"One who has been appointed or elected to hold an office after the term of the present incumbent." Black's Law Dictionary, 3rd. Ed., page 1674.

"A successor is one who succeeded or follows; 'a person who has been appointed or elected to some office after another person.'" In re Duncan's Estate, 199 Atlantic, 208, 210, 330 Pa. 241, citing 2 Bouvier Law Dictionary, Rawle's Third Revision, page 3176.

Hence, only a successor in office to Paul A. Porter, Price Administrator, can be substituted as plaintiff in this case. A successor to Paul A. Porter, Price Administrator, could be appointed by the President only "with the advice and consent of the Senate." An appointment of a successor to the Office of Price Administration is effective only upon a confirmation of the appointment by the Senate. To permit the substitution of Philip B. Fleming in this case would constitute a holding that the provisions of the statute requiring confirmation of the Senate may be disregarded by the President of the United States, a position which we believe is completely untenable.

To demonstrate even more clearly that Philip B. Fleming is not the successor in office to Paul A. Porter, resigned Price Administrator, reference is again made to Supplementary Order 193 exempting

all commodities (including services) from price control, except sugar, molasses, syrup and rice (see Supplementary Order 193, Fed. Reg. Nov. 14, 1946, page 13464, Vol. 11, No. 222). The Emergency Price Control Act of 1942, as amended, calls for the exercise of the judgment of the Administrator of the Office of Price Administration to establish by regulation or order maximum prices as in his judgment will be generally fair and equitable when the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purpose of the Price Control Act. If Philip B. Fleming sought to revoke Supplementary Order 193 and to, by regulation or order, establish maximum prices on commodities other than sugar, molasses, syrup and rice, can it be argued that he has the power to do so in view of the fact that he has not been appointed Administrator of the Office of Price Administration; he has not been appointed by the President "with the advice and consent of the Senate." The conclusion seems to be inescapable that Philip B. Fleming is not the successor in office to Paul A. Porter, Price Administrator, Office of Price Administration, that he occupies another and entirely distinct office upon which the President has sought to confer functions of the Price Administrator, an action which we believe we have demonstrated is without legal basis or foundation. Since Philip B. Fleming is not the successor in office, no authority exists for his substitution as party plaintiff in the instant suit. (See *United States, ex rel. Bernardin v. Butterworth*, 100 U. S. 600, holding that in the absence of a Statute permitting the successor in office to be brought into the case by petition or some other appropriate

method, a suit against the Commissioner of Patents to issue a patent abates by the death of the Commissioner.)

C. There is no substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved.

Under 28 U.S.C.A. Section 780 above quoted which was enacted following the *Butterworth* case, it must be "satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved." This would appear to mean that the proofs submitted to the court must be sufficient to satisfy reasonable judicial requirements. "Such evidence as is sufficient to produce a belief that a thing is true; credible evidence; such evidence as, in respect to its amount or weight, is adequate or sufficient to justify the court or jury in adopting the conclusion in support of which it is adduced" (Citing cases). *Black's Law Dictionary*, 3d Ed., page 701. As of the date of filing this brief but an infinitesimal portion of the nation's economy is subject to what purports to be price control. The President, by Executive Order 9801 of November 9, 1946 has terminated all controls stabilizing wages and salaries. At the time all controls over wages and prices were lifted with the exception of controls kept over sugar, rice and rent, the President made a statement which is found in Commerce Clearing House, War Law Service, 41371, reading in part as follows:

"The general control over prices and wages is justifiable only so long as it is an effective in-

strument against inflation. I am convinced that the time has come when these controls can serve no useful purpose. I am, indeed, convinced that their further continuance, would do the nation's economy more harm than good. Accordingly, I have directed the immediate abandonment of all control over wages and salaries and all control over prices except that necessary to implement the rationing and allocation programs of sugar and rice. Rent control, however, must and will be continued. * * *

"There is no virtue in control for control's sake. When it becomes apparent that controls are not furthering the purposes of the stabilization laws, but would, on the contrary, tend to defeat these purposes, it becomes the duty of the Government to drop the controls. * * *

"The real basis of our difficulty is the unworkable price control law which the Congress gave us to administer. The plain truth is that, under this inadequate law, price control has lost the popular support needed to make it work. At best, the administration of price control is an extraordinary difficult and complex business and it can work successfully only if the people generally give it their support."

Aside from the bare statement contained in plaintiff's motion for substitution no showing of any kind has been made that there is a substantial need for continuing this cause and securing an adjudication.

In view of the foregoing statements of the President, it is respectfully submitted that there is no substantial need present in continuing and maintaining this cause and by reason of the actions taken by the President and the Price Administrator prior to his resignation, this whole problem has become moot.

CONCLUSION

For the reasons stated in the Motion of the Respondent the Order of this court dated December 16, 1946, permitting the substitution of Philip B. Fleming, Temporary Controls Administrator, for Paul A. Porter, Price Administrator, Office of Price Administration, should be vacated and set aside, and the ruling of the court made that said Temporary Controls Administrator cannot legally be substituted in any such litigation.

Respectfully submitted,

**BROWN, FENLON
& BABCOCK,**

*Attorneys for Respondent
and Moving Party.*

By: John W. Babcock.

DAVID A. GOLDMAN,
*Of Counsel,
On the Brief.*

February, 1947.